***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-6104 Signed

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

B

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

P/S

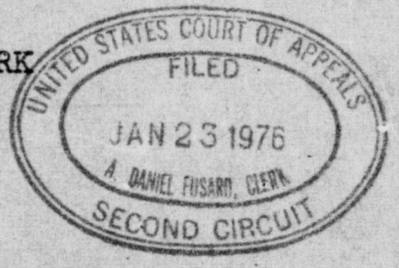
SALVATORE CIRAMI AND MARGARET CIRAMI,

Defendants-Appellants

JAMES CIRAMI, MASPETH FEDERAL SAVINGS AND LOAN ASSOCIATION, NANCY CIRAMI, DIGGS MANAGEMENT CORP., JACOB ZELIGFELD, PRUDENTIAL INSURANCE COMPANY OF AMERICA, ANGELA CIRAMI and ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Defendants

ON APPEAL FROM THE ORDER OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK




BRIEF FOR THE APPELLEE

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# BRIEF FOR THE APPELLEE

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## STATEMENT OF THE ISSUE PRESENTED

Whether the District Court abused its discretion in denying taxpayers' motion to vacate the judgment involved herein where taxpayers presented no reason to justify such relief, offered no explanation as to the almost one year's delay in filing such motion, and have not presented a meritorious defense.

STATEMENT OF THE CASE

This is an appeal by Salvatore Cirami (Salvatore) and Margaret Cirami (Margaret) (hereinafter sometimes referred to as taxpayers[1]) from a memorandum and order of the United States District Court for the Eastern District of New York, filed on October 6, 1975. (R. A-149 - A-152.)[2]

By this memorandum and order, the District Court (Honorable Walter Bruchhausen) denied the motion of Salvatore and Margaret to vacate a judgment pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure. Salvatore and Margaret timely filed a joint notice of appeal on October 10, 1975. (R. A-154.) Jurisdiction is conferred upon this Court by 28 U.S.C., Section 1291.

The relevant facts of this case, as established in the record, may be summarized as follows:

This action was commenced on February 28, 1973, by the United States filing a complaint in the District Court, pursuant to Section 7401 of the Internal Revenue Code of 1954 (26 U.S.C.), to reduce to judgment certain federal income tax

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1/ Salvatore and Margaret are each separately represented in this case.

2/ "R." references are to the separately bound record appendix.

assessments against Salvatore and Margaret, to set aside as fraudulent a conveyance of certain real property to their son, James Cirami (James), to foreclose federal tax liens against such real property, and to obtain a personal judgment against James for the proceeds of a mortgage he executed upon such real property. (R. A-2, A-49-A-55.) By their answer, filed on March 20, 1973, through their then attorney, Peter R. Newman (Newman), Salvatore, Margaret and James denied the essential grounds of relief as alleged in the complaint. (R. A-2, A-57-A-58.) 3/

On December 28, 1973, the United States filed its motion for partial summary judgment to reduce to judgment the tax assessments outstanding against Salvatore and Margaret. (R. A-61.) The affidavit of William M. Wolf (Wolf), Acting District Director of Internal Revenue for the District of Brooklyn, New York, was filed in support of the motion. (R. A-62-A-63.) As established in that affidavit, there were federal tax assessments (plus penalties, assessed interest, and accrued interest to December 20, 1973) in the total amount of $268,332.70 outstanding against Salvatore and

3/ In addition, Salvatore and Margaret asserted a counterclaim against the United States for refund of income taxes allegedly erroneously collected. (R. A-57-A-58.) Upon motion of the United States (Motion of May 17, 1973), the District Court dismissed this counterclaim (Order of October 2, 1973).

Margaret[4] for their taxable years ended December 31, 1961, 1962 and 1963, for which demand for payment had been made and which remained unpaid as of December 28, 1973. (R. A-63.) By its memorandum and order of March 18, 1974, the District Court granted the Government's motion for partial summary judgment, "There being no opposition * * *." (R. A-72-A-73.) A final judgment was entered against Salvatore and Margaret in the total amount of $270,792.43 on June 12, 1974.[5] (R. A-74-A-75.)

By September 12, 1974, Newman had been replaced as counsel for taxpayers by Carl N. Mione (Mione).[6] (United States Memorandum in Opposition to Taxpayers' Motion to Vacate Summary Judgment entered June 12, 1974 (hereinafter Memorandum in Opposition), 1-2.)[7] On October 4, 1974, counsel for the Government, William R. Morrow, Jr. (Morrow), was informed by the law firm of Wagman, Cannon & Musoff, P.C. (Musoff) that Musoff was then representing Margaret and James and that Mione was representing Salvatore. (Memorandum in Opposition, p. 2.)

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4/ Then husband and wife, Salvatore and Margaret filed joint returns for the years in issue. (R. A-6, A-12-A-13, A-19-A-20.)

5/ In addition, this judgment stated "* * * it being expressly determined that there is no just reason for delay it is * * * ORDERED, ADJUDGED AND DECREED that said final judgment against defendants Salvatore and Margaret Cirami be entered forthwith." (R. A-74-A-75.)

6/ In their brief, taxpayers stated (p. 6) that Salvatore substituted counsel on August 28, 1974.

7/ The facts set forth in the Memorandum in Opposition were attested to by counsel for the Government, William R. Morrow, Jr., upon his personal knowledge, in an affidavit filed with the Memorandum in Opposition. (R. A-85.) These facts were not disputed below by taxpayers.

Musoff filed an entry of appearance on December 23, 1974. (R. A-76.)

On May 1, 1975, Salvatore and Margaret, through their respective counsel, filed a joint motion, pursuant to Rule 60(b)(6), Federal Rules of Civil Procedure, to vacate the judgment entered against them on June 12, 1974. (R. A-3, A-77-A-78.) Subsequently, taxpayers introduced Exhibits A through V purportedly being various records and miscellaneous papers of Air Freight Haulage Co. (Ex. A-V; see also, R. A-145-A-147.) Air Freight Haulage Co. was a sole proprietorship of Salvatore during the years 1961, 1962 and 1963. (R. A-79.) The disallowance of various deductions with respect to Air Freight Haulage Co. gave rise, in substantial part, to the assessments involved in this case. (R. A-27-A-46.)

In addition, taxpayers introduced the affidavits of two accountants, Bernard Zipern (Zipern) (R. A.-86-A-87) and Seymour Unterberg (Unterberg) (R. A.-88-A-90). Zipern attested that his accounting firm (Zipern & Cooper) had audited the books and records of Air Freight Haulage Co. during the years 1962 and 1963, and had maintained the check disbursements journal (Ex. A) for the period January, 1963 through November 12, 1963. Unterberg attested that he audited the books and records of Air Freight Haulage Co. during the years 1961 and 1962 and that during that period he used the check disbursements journal (Ex. A) and the check stubs (Ex. B-1 through B-5) to verify check disbursements. In addition, from Exhibits A

through V, Unterberg purported to substantiate virtually all of the claimed business expense deductions of Air Freight Haulage Co. (Ex. A-1; R. A-91-A-144.)

By its memorandum and order of October 6, 1975, the District Court denied taxpayers' motion to vacate the judgment. (R. A-149-A-152.) The District Court found that taxpayers had not shown the requisite "exceptional circumstances" for relief under Rule 60(b)(6), that their motion had not been made within a reasonable time as required by the rule, and that taxpayers had not shown a meritorious defense to the Commissioner's assessments. Taxpayers appeal.

## SUMMARY OF ARGUMENT

The requirements for relief from a judgment under Rule 60(b), Federal Rules of Civil Procedure, are threefold. First, the movant must show some reason justifying relief. Under the residual clause, Rule 60(b)(6), this requires a showing of exceptional circumstances. Second, the motion must be made within the requisite time period, which, under Rule 60(b)(6), is a reasonable time. Third, the movant must show a meritorious claim or defense. In this case, the lower court found that taxpayers met none of these requirements and denied their motion. That ruling cannot be said to be an abuse of discretion.

First, taxpayers have shown no basis justifying relief. Although they claim to have a meritorious defense to the tax assessments in question, this Court has held that a valid claim is not sufficient grounds for relief under Rule 60(b). The size of a default judgment does not change this result. Furthermore, errors of counsel, even to the extent of allowing a default judgment to be entered, are not sufficient for relief. Nor have taxpayers shown that their first counsel was in any manner negligent. Taxpayers' having shown no legitimate basis for relief, the District Court properly denied their motion.

Second, taxpayers have offered no justifiable reason for their delaying almost one year in making their motion. They had replaced their first counsel within three months of the entry of judgment. New counsel still waited many months before making

this motion. Nor does the amount of evidence eventually produced justify this delay for the simple reason that taxpayers' motion, when made, was not in any way predicated on this evidence. In short, taxpayers have shown no legitimate reason for not making their motion months earlier, and the District Court properly found that this delay was unreasonable.

Third, the miscellaneous records and papers of Air Freight Haulage Company relied upon by taxpayers are wholly insufficient to overcome the presumptive correctness of these tax assessments. Not only are these records incomplete, but also, being totally uncorroborated, they provide no proof of actual payment. In this respect, the District Court properly took notice of Salvatore's conviction for filing false and fraudulent tax returns to discount the credibility of these documents. Moreover, these records in no way show the business relatedness of any of the claimed deductions.

The order of the District Court is correct and should be affirmed.

## ARGUMENT

### THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING TAXPAYERS' MOTION TO VACATE THE JUDGMENT ENTERED AGAINST THEM

Rule 60(b), Federal Rules of Civil Procedure, Appendix, infra, provides that, upon motion, a party may be relieved from a final judgment, generally, for the following reasons: (1) mistake, inadvertance, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; (3) fraud or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied; or (6) any other reason justifying relief. The rule further provides that any such motion must be made within a reasonable time, and, for reasons (1), (2), and (3) above, not more than one year after the entry of the judgment.

In order for a motion for relief to be granted under Rule 60(b), it is generally recognized that the moving party must show three things. First, he must show that there is some basis under the rule for granting the requested relief. Rinieri v. News Syndicate, Inc., 385 F. 2d 818 (C.A. 2, 1967); Wagner v. United States, 316 F. 2d 871 (C.A. 2, 1963). Second, he must show that the motion has been brought within the requisite time period. Radack v. Norwegian American Line Agency, 318 F. 2d 538 (C.A. 2, 1963); Schildhaus v. Moe, 335 F. 2d 529 (C.A. 2, 1964). Third, he must show a meritorious claim or defense; that is, the moving party "must show facts which, if established,

might reasonably be said to be a basis for recovery." Beshear v. Zeinzapfel, 474 F. 2d 127, 132 (C.A. 7, 1973). Furthermore, a motion for relief under Rule 60(b) is addressed to the sound discretion of the District Court (Cavallictis v. Salomon, 357 F. 2d 157 (C.A. 2, 1966)), and its ruling thereon will not be overturned on appeal unless shown to be an abuse of discretion (United States v. Erdoss, 440 F. 2d 1221 (C.A. 2, 1971)).

Rule 60(b)(6), the "other reason" clause, is a residual clause, encompassing all of those reasons justifying relief other than those set forth in clauses (1) through (5). Klapprott v. United States, 335 U.S. 601 (1949), modified, 336 U.S. 942 (1949). However, its scope is "extremely meagre" (United States v. Karahalias, 205 F. 2d 331, 333 (C.A. 2, 1953)), and relief under this clause requires a showing of "exceptional circumstances" (Rinieri v. News Syndicate Co., supra, p. 822). Moreover, while there is no specific time period within which the motion must be made under Rule 60(b)(6), the rule does require that any such motion be made within a reasonable time. The movant must show a justifiable reason for delay. Rinieri v. News Syndicate Co., supra. Unexplained delays (Schildhaus v. Moe, supra (eight months)); Westerly Electronics Corp. v. Walter Kidde & Co., 367 F. 2d 269 (C.A. 2, 1966) (ten months)) or frivolous reasons for dealy (Standard Newspapers, Inc. v. King, 375 F. 2d 115 (C.A. 2, 1967)) are sufficient to deny the motion.

Taxpayers' motion in this case was made pursuant to Rule 60(b)(6). (R. A-77-A-78.) In denying this motion, the court below found that taxpayers had not shown the requisite "exceptional * * * circumstances" for relief, that their motion was not made within a reasonable time, and that taxpayers had not shown a meritorious defense to the Commissioner's assessments. (R. A-151-A-152.) We submit that these findings are well-grounded on both the law and the facts of this case. They certainly did not constitute an abuse of discretion. We further submit that taxpayers' arguments against this result are unmeritorious and should be rejected.

With respect to the reasons allegedly justifying relief, taxpayers argue primarily (Br. 12-17) that the documentary evidence presented below established as a matter of law that they did not owe the taxes as set forth in the assessments, that the assessments were arbitrary, and that, as a result, the judgment complained of has been entered against them for $270,793.43 upon tax liabilities which they allegedly do not owe. However, even assuming the correctness of these premises, they do not establish the right to relief under Rule 60(b)(6). This Court has held that the failure to present an allegedly valid claim or defense is not sufficient for relief under the rule. Schwarz v. United States, 384 F. 2d 833 (1967). Certainly the amount of the judgment does not change this result. United States v. Erdoss, supra (default judgment in excess of $3,000,000 did not justify relief under Rule 60(b)).

Taxpayers further argue (Br. 18-19) the failure of their first attorney, Newman, to present this evidence, "for reasons unknown," is also grounds for relief. However, mere errors of counsel (assuming Newman's actions to be such) do not warrant relief under Rule 60(b). United States v. Erdoss, supra; Benton v. Vinson, Elkins, Weems & Searls, 255 F. 2d 299 (C.A. 2, 1958), cert. denied, 369 U.S. 828 (1962). Thus, in Schwarz v. United States, supra, this Court held that relief under Rule 60(b) was not justified where the movant's counsel had taken on more cases than he could properly handle, and the movant's case was dismissed. As the Court explained, the proper remedy was a malpractice suit against the lawyer. Here, taxpayers have shown no reasons whatsoever for the alleged neglect of Newman. Nor are there any facts in this record to show that Newman was, in fact, negligent. Certainly taxpayers have made no showing justifying relief.

Furthermore, the mere failure to oppose a motion for summary judgment cannot, of itself, be grounds for relief under Rule 60(b). Otherwise, the record in this case discloses the possibility of even further motions under that rule. Specifically, on May 16, 1975, after Newman had been replaced as counsel, the Government moved for various relief against James, including partial summary judgment on the fraudulent conveyance issue. (R. A-82-A-83.) On October 6, 1975, the District Court granted all of the requested relief, "There being no opposition submitted * * *." (R. A-153.)

With respect to the reasonableness of the delay in bringing their motion, taxpayers argue (Br. 20) Musoff did not enter his appearance in this case until December 23, 1974, and that between that date and the date the motion was filed, May 1, 1975, he "earnestly and expeditiously" assembled the "voluminous" records necessary to support taxpayers' motion. This argument, however, is patently misleading. First, Mione replaced Newman as taxpayers' counsel at least as early as August 28, 1974.[8/] (Br. 6.) Musoff was retained as counsel for Margaret at least by October 4, 1974. (Memorandum in Opposition, p. 2.) Musoff's entry of appearance in December, 1974, is thus hardly relevant to the issue presented here. Second, the evidence of record indicates that the various records of Air Freight Haulage Company which were ultimately submitted below had no bearing upon when taxpayers filed this motion. That motion was supported solely by the affidavit of Salvatore (R. A-79-A-81) and taxpayers' memorandum in support of their motion. Neither of these documents placed any reliance upon the records of Air Freight Haulage Company, which were not even introduced below until July 1, 1975. (Affidavit of Wallace Musoff, dated June 30, 1975, p. 2, filed July 1, 1975 (R. A-4).) Indeed, the affidavits of the accountants, Zipern and Unterberg, were not even signed until the end of June, 1975 (R. A-87, A-90), almost two months after the motion was filed. If these records and affidavits were not necessary for the filing of the motion on May 1, 1975, we cannot understand why such motion could not have been filed months earlier.

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8/ In fact, Mione's relationship with Salvatore dates back at least until June 3, 1973. See R. A-60.

Third, taxpayers purported reasons for the extended delay in filing this motion do not comport with the fact that their counsel apparently had sufficient time to file several other documents in this case prior to May 1, 1975, including a motion for leave to file an amended answer, an answer to an amended complaint, and answers to interrogatories. See R. A-3. In short, taxpayers' arguments to justify their almost one year delay in bringing this motion do not comport with the facts of this case (Rinieri v. News Syndicate Co., supra), are frivolous (Standard Newspapers, Inc. v. King, supra), and are otherwise unexplained (Western Electronics Corp. v. Walter Kidde & Co., supra), each of which is sufficient to deny their motion.

Taxpayers' reliance on various cases cited in their brief (p. 21) is misplaced. The four year delay in Klapprott v. United States, supra, was occasioned by the movant's confinement in various penal institutions which the Court characterized as "wrongful." 335 U.S., p. 608. In both Cavalliotis v. Salomon, supra, and Radack v. Norwegian American Line Agency, supra, the delays of several months were the result of failures to be notified of dismissals; in each case, however, the motion for relief was filed within one month of receiving such notice. In Pierre v. Bernuth, Lembche Co., 20 F.R.D. 116 (S.D. N.Y., 1956), the delay was caused by the movant's confinement in a mental institution and his subsequent deportation; the court in that case, moreover, specifically found that movant's counsel had acted with reasonable diligence. As is evident, none of these

cases has any application to the facts of this case.[9/] Here, taxpayers have offered no legitimate reason for their delay in bringing this motion, and the District Court below expressly found that it was not made within a reasonable time. Cf. Schildhaus v. Moe, supra; Cururillo v. Schulte, Bruns Schiff Gesellschaft, M.B.H., 324 F. 2d 234 (C.A. 2, 1963).

Nor have taxpayers shown a meritorious defense to these tax assessments. Their argument (Br. 12-17) that the miscellaneous records and papers of Air Freight Haulage Company (Ex. A-V) constitute "unrefuted evidence of the substantiation of the claimed expenditures" (Br. 13) is wide of the mark for several reasons. First, an examination of those exhibits (see R. A-145-A-147) shows that they contain significant gaps both as to time and as to character. For example, the miscellaneous bills introduced (Ex. H-M) cover only 1963. In addition, substantial numbers of the check stubs (Ex. B-1-B-5, B-9) do not disclose the payees. Second, these records do not themselves establish proof of payment. They are merely Salvatore's own records. There are no cancelled checks, receipts, or other documents to confirm their validity. Nor has confirmation been established by third parties. In light of this, the District Court properly took notice (R. A-152) of

9/ McKinney v. Boyle, 404 F. 2d 632 (C.A. 9, 1968), cert. denied, 394 U.S. 922 (1969), rehearing denied, 395 U.S. 941 (1969) relied upon by taxpayers (Br. 21), is clearly distinguishable on its face. The question in that case was whether the one year period for Rule 60(b)(3) applied, and, in turn, whether the movant's allegations concerned fraud of "an adverse party."

Salvatore's conviction for false and fraudulent tax returns (United States v. Cirami, 510 F. 2d 69 (C.A. 2, 1975), cert. denied, 421 U.S. 964 (1975)) to discount the credibility of these records.

More importantly, however, none of these records establish that any of the expenses indicated therein were ordinary and necessary business expenses. Again we refer to the substantial number of documents where the payees are not disclosed, or where payees are "cash", "petty cash," "Diners Club," and the like. (See, e.g., Ex. A, B-1, and B-9.) The burden was upon taxpayers to show the deductibility of each item (Burnet v. Houston, 283 U.S. 223 (1931); mere proof of an expenditure does not satisfy this burden (Lydon v. Commissioner, 351 F. 2d 539 (C.A. 7, 1965)). Herein lies the distinction between this case and Cohan v. Commissioner, 39 F. 2d 540 (C.A. 2, 1930), relied upon by taxpayers. (Br. 16.) In Cohan, this Court held that, where there was proof that some expenditures were business related, inexactitude was no basis for denying a deduction. Contrary to taxpayers' argument (Br. 16), Cohan does not give taxpayers carte blanche to take deductions merely because Salvatore was in business.

Taxpayers' argument, moreover, is not strengthened by accountant Unterberg's worksheets. His analysis purports to substantiate the deductions of Air Freight Haulage Co. (R. A-90.) Again, this analysis, based upon these records, cannot establish that any of the claimed deductions were business related. Moreover, much of this "substantiation" is again based upon documents

where the payees are unknown (see, e.g. R. A-131-A-135), and, indeed, substantial sums contained in his worksheets are not reflected in the available records at all (see, e.g. the $18,080 item on R. A-100). We submit, therefore, that the District Court correctly found that this hodge-podge of records did not overcome the presumptive correctness of the Commissioner's determination.

Finally, taxpayers' arguments (Br. 22-26) against the original order granting the Government's motion for partial summary judgment is clearly improper. Motions under Rule 60(b) cannot be used as a substitute for appeal. Wagner v. United States, supra. A final appealable judgment was entered against taxpayers on June 12, 1974. (R. A-74-A-75.) The time to take an appeal from that judgment has long since expired.

Their argument is, in any event, unmeritorious. The assessments made by the Commissioner and introduced below (R. A-62-A-63) are presumptively correct and are prima facie evidence of taxpayers' tax liability. United States v. Lease, 346 F. 2d 696 (C.A. 2, 1965). While a taxpayer has the right to contest the correctness of such determinations in a collection action brought by the Government (United States v. O'Conner, 291 F. 2d 520 (C.A. 2, 1961)), summary judgment is proper where the taxpayer fails to provide any evidence countervailing the assessments (United States v. Feinberg, 372 F. 2d 352 (C.A. 3, 1967)). Here, taxpayers offered no opposition to the Government's motion for partial summary judgment to reduce these tax assessments to judgment. (R. A-72.) In these circumstances, the District Court properly granted partial summary judgment.

In conclusion, we would like to emphasize that taxpayers have been represented by counsel at all stages of this litigation. There has been no showing that their first counsel, Newman, was at all derelict in his duties. But even if he was, that is not grounds for relief from this judgment. Cf. Link v. Wabash Railroad, 370 U.S. 626, 633-634 (1962).

## CONCLUSION

The order of the District Court is correct and should be affirmed.

Respectfully submitted,

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JANUARY, 1976.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made upon opposing counsel by mailing two copies thereof to each of them, on this 22d day of January, 1976, in envelopes, with postage prepaid, properly addressed to each of them, respectively, as follows:

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APPENDIX

Federal Rules of Civil Procedure:

Rule 60.

Relief From Judgment or Order

* * *

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *.